

U.S. Department of Labor

Office of Administrative Law Judges
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DATE ISSUED: August 2, 1999

CASE NO.: 1998-ERA-20

In the Matter of:

MOUSSA RAISZADEH, Ph.D,
Complainant,

VS.

VETERANS ADMINISTRATION
MEDICAL CENTER, LOMA LINDA,
CALIFORNIA (JERRY L. PETTIS
MEMORIAL DEPARTMENT OF
VETERANS AFFAIRS MEDICAL
CENTER),
Respondent.

**RECOMMENDED DECISION AND ORDER APPROVING SETTLEMENT AND
APPROVING WITHDRAWAL OF COMPLAINT**

This case arises under the employee protection provisions of the Energy Reorganization Act of 1974 (ERA), as amended, 42 U.S. C. § 5851, and the implementing regulations at 29 C.F.R. Part 24. A hearing regarding this matter was scheduled for July 26, 1999. On the day of the hearing, after negotiations between the parties, both represented by counsel, the parties submitted a settlement agreement to me for my review and approval, attached hereto and incorporated herein by reference.

I must determine whether the terms of the agreement are a fair, adequate and reasonable settlement of the complaint. 42 U.S.C. § 585,1 (b)(2)(A) (1988). *Macktal v. Secretary of Labor*; 923 F.2d 1150, 1153-54 (5th Cir. 1991); *Thompson v. U.S. Department of Labor*, 885 F.2d 551, 556 (9th Cir. 1989); *Fuchko & Yunker v. Georgia Power Co.*, 89-ERA-9, 89-ERA-10 (Sec'y Mar. 23, 1989), slip op. at 1-2.

The parties agree that in consideration for the Complainant withdrawing his Complaint (98-ERA-20) in its entirety, and waiving any claims arising from the issues of that Complaint, the Jerry L. Pettis Memorial Veterans Affairs Medical Center ("Employer") agrees to: (a) pay Complainant's attorney

documented fees not to exceed \$27,500.00; (b) change Complainant's 1996-97 performance appraisal rating from "Highly Successful" to "Outstanding" by rating the Complainant "Exceptional" in all categories, including "Interpersonal Relationships/Customer Satisfaction," making that appraisal an official record and destroying the old performance appraisal; (c) continue its commitment to not condone retaliation against employees for filing complaints; (d) continue its commitment to a successful Radiation Safety Program; and, (e) provide clerical assistance to support the Radiation Safety Program, including recording minutes of the quarterly Radiation Safety Committee.

Paragraph 3(d) provides that

[t]he terms of this agreement shall be kept confidential and only disclosed to authorized DOL officials, NRC officials or other officials responsible for and involved in implementing and enforcement of this agreement. Employee may disclose the terms of this agreement to his attorney and, if necessary, to his accountant. This prohibition against disclosure shall not apply to disclosure under a routine use of the Privacy Act.

The Secretary of Labor has held with respect to confidentiality provisions in settlement agreements that the Freedom of Information Act, 5 U.S.C. § 552 (1988) ("FOIA") "requires agencies to disclose requested documents unless they are exempt from disclosure." *Coffinan v. Alyeska Pipeline Services Co.*, 96-TSC-5 (ARB June 24, 1996), slip op. at 2-3; *see also Plumlee v. Alyeska Pipeline Services Co.*, 92-TSC-7 (Sec'y Aug. 6, 1993), slip op. at 6; *Davis v. Valley View Ferry Authority*, 93-WPC- I (Sec'y June 28, 1993), slip op. at 2, n. 1 (parties submissions are subject to FOIA); *Ratliff v. Airco Gases*, 93-STA-5 (Sec'y June 25, 1993), slip op. at 2.

The records in this case are agency records and therefore must be made available for public inspection and copying under FOIA. If a member of the public requests inspection and copying, that request requires a response as provided in FOIA. If an exemption applies to the record in this case or any document in it, the Department of Labor would determine whether to exercise its discretion to claim the exemption and withhold the document. If no exemption is applicable, the document would be disclosed. Since no FOIA requests have been made, it would be premature to determine whether any FOIA exemptions apply and whether the Department of Labor would exercise its authority to claim an exemption and withhold the requested information. Furthermore, it would be inappropriate to decide such questions in this proceeding. *Timmons v. Mattingly Testing Services, Inc.*, 95-ERA-40 (ARB April 18, 1997). Department of Labor regulations provide specific procedures for responding to FOIA requests, for appeals by requesters from denial of such requests, and for protecting the interests of submitters of confidential commercial information. See 29 C.F.R. Part 70 (1995).

The confidentiality provisions of the instant agreement provide for the Complainant to communicate with and provide information to any state or federal government agency, or to be compelled to provide information pursuant to a legal process.¹ Thus, the confidentiality provisions of this agreement do

¹Specifically, paragraph 3d indicates that the "prohibition against disclosure shall not apply to a disclosure under a routine use of the Privacy Act." The Department of Labor Systems of Records maintained under the Privacy Act are published at 58 FR 49548 (Sept. 23, 1993). The System of Records for the Office of Administrative Law Judges includes records relating to appeals under the ERA. See 58 FR 49582. Those records are disclosable under eleven universal routine uses which

not violate the Secretary's prohibition against "gag provisions" in such agreements, which would be against public policy. *Thorlon v. Burlington Environmental & Phillip Environmental*, 94-TSC-2 (Sec'y Mar. 17, 1995).

The Secretary requires that all parties requesting settlement approval of cases arising under environmental protection statutes provide the settlement documentation for any other alleged claims arising from the same factual circumstances forming the basis of the federal claim, or certify that no other such settlement agreements were entered into between the parties. *Biddy v. Alyeska Pipeline Service Co.*, 95-TSC-7 (ARB Dec. 3, 1996), slip op. at 3. Paragraph 3f of the settlement agreement submitted to me states that "[t]his agreement constitutes the entire agreement and there are no other terms to this agreement except those specified herein." I find that there were no other settlement agreements arising from the same factual circumstances which formed the basis for this claim.

The Respondent has agreed to pay Complainant's attorney an amount not to exceed \$27,500.00 to cover documented attorney's fees related to the instant Complaint. Where attorney's fees are incorporated into an agreement, the administrative law judge does not approve the fee amount. If however, the parties submit an agreement providing for the complainant to pay his attorney, the ALJ must take into consideration whether the net amount to be received by the complainant is fair, adequate and reasonable. *Tinsley v. 179 South Street Venture*, 89-CAA-3, Sec. Order of Remand, Aug. 3, 1989, slip op. at 3. As Complainant in this case is not required to pay his attorney, this ALJ need not make that determination, nor need she take any action regarding approval of the amount incorporated into the agreement.

I therefore find that the agreement, incorporated herein by reference and made part of this Order, is a fair, adequate and reasonable settlement of the complaint. Accordingly, I recommend that the settlement agreement be APPROVED, and that the withdrawal of the complaint with prejudice be APPROVED.

ANNE BEYTIN TORKINGTON
Administrative Law Judge

San Francisco, California

NOTICE: This Recommended Order will automatically become the final order of the Secretary unless, pursuant to 29 C.F.R. § 24.8, a petition for review is timely filed with the Administrative Review Board, United States Department of Labor, Room S-4309, Francis Perkins Building, 200 Constitution Avenue, NW, Washington D.C. 20210. Such petition for review must be received by the Administrative Review Board within ten business days of the date of this Recommended Decision and Order, and shall be served on all parties and on the Chief Administrative Law Judge. See 29 C F R §§ 24.8 and 24.9, as amended by 63 Fed. Reg. 6614 (1998).

encompass communication with federal or state enforcement agencies concerning alleged violations of law. See General Prefatory Statement at 58 FR 49554-49555.

